In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-14

LEOLA STUDDERT GISSEL, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend they are not liable for customs duty on foreign vessel repairs under blanket bonds whereby they undertook to pay all charges in connection with the berthing of a vessel that were not paid otherwise.

These consolidated cases were brought in the district court by the United States to recover from the principals and/or sureties of two $10,000 blanket term bonds on the SS SEA PIONEER for entries into Port Arthur, Texas, in 1964, and Galveston, Texas, in 1965. The SEA PIONEER's owners did not pay applicable customs duties and subsequently became insolvent (Pet. 4-5). The bonds provided that the principals "shall promptly pay any duties, charges, exactions, penalties, or other sums found legally due the United States from any master or other proper officer or owner of said vessels * * * on account of said vessels * * *." The United States asserted that the clear language of the bonds

expressly and unequivocally guaranteed prompt payment of custom duties assessed against the vessel pursuant to 19 U.S.C. (1964 ed.) 257[1] as a result of foreign vessel repairs.

The district court found that the language of the bonds must be given its plain meaning, and the defendants were thus liable for duties on vessel repairs done in a foreign port:

> Defendants Collin & Gissel and Thibodeaux were acting as local berth agents, and in that capacity they undertook to post and posted blanket bonds which literally recite and provide for the assumption of all duties or penalties legally due the Government from any master or vessel owner which the agent has undertaken to represent at the port. * * * To construe the language of the blanket bonds so as to include foreign repair duties merely requires the implementation of its plain meaning [Pet. App. 44-45].

The district court further found "this construction of the scope of the liability of the blanket bonds is viewed as being entirely consistent with the purpose of the tariff statute" (Pet. App. 47). The court of appeals affirmed, stating that:

> Defendants' contention that the bonds which they signed did not in terms cover such duties, based on a construction they seek to give the prefatory "whereas" clauses, is not only unpersuasive in itself in view of the breadth of language, including the fact that there are four paragraphs in the bond referring to duties, but is firmly rebutted by the fact that the bond form which defendants signed, No. 7569, is particularly specified in 19 C.F.R. §4.14 as suitable for covering the duty due on account of repairs [Pet. App. 59].

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[1]This provision was recodified and is presently found in 19 U.S.C. 1466.

Petitioners primarily contend that the bonds were not authorized by the applicable statutory and regulatory scheme. In addition, they maintain that Congress intended that foreign repair duties "be treated as individual cases" and that "bonds be issued to fit the particular situation" (Pet. 11). However, 19 U.S.C. (1964 ed.) 257 (recodified in 19 U.S.C. 1466) expressly requires the prompt payment of foreign repair duties at an American vessel's first American port of entry. (See Pet. App. 36-37.) And 19 U.S.C. 1623 provides:

> (a) In any case in which bond or other security is not specifically required by law, the Secretary of the Treasury may by regulation or specific instruction require, or authorize collectors of customs to require, such bonds or other security as he, or they, may deem necessary for the protection of the revenue or to assure compliance with any provision of the law, regulation, or instruction which the Secretary of the Treasury or the Customs Service may be authorized to enforce.

Moreover, blanket term bonds are expressly authorized by 19 U.S.C. 1623(b)(3).[2] It is thus clear that the bonds in question were authorized. In any event, the question of statutory authorization is irrelevent to petitioners' liability. Certainly the bonds were not prohibited, and petitioners' liability is premised upon their voluntary undertaking which expressly guaranteed payment. (See Pet. App. 59-60.)

Finally, petitioners claim that they should be relieved from liability because the government failed to collect the duty immediately from the vessel's master rather than relying on the berthing agent's bond after the bankruptcy of the vessel's owner (Pet. 20, 25).

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[2]See also 19 C.F.R. 25.4.

It must again be noted that the lower courts held that petitioners voluntarily bound themselves by filing the pertinent bonds. Their liability was not statutorily imposed. Further, as stated by the court of appeals (Pet. App. 60):

> * * * since the very purpose of furnishing a duty bond is to permit the vessel to clear without paying the duty, the agent cannot claim that permitting the vessel to depart was an unconsented-to release of the security, or extension of credit to the principal, which discharged the surety. Nor are we persuaded by the argument that the government should have proceeded with more dispatch against the vessel. It may be, as defendants suggest, that berthing agents were never charged for uncollectible duty before, but, as the district court held, this does not mean that the liability was not clearly undertaken.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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